IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 17TH DECEMBER 2007 / 26TH AGRAHAYANA 1929

RSA.No. 806 of 2007()

AS.86/2006 of ADDL.DISTRICT COURT, THRISSUR
OS.1194/1983 of I ADDL.M.C.,THRISSUR

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: APPELLANT/APPELLANT/PLAINTIFF

ARAVINDHAKSHAN, AGED 65 YEARS,
S/O GOVINDAN, MANAKALATH HOUSE,
CHOORAKKATUKARA DESOM, PUZHAKKAL VILLAGE,
THRISSUR TALUK.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

RESPONDENTS: RESPONDENTS/DEFENDANTS

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1. CHOORAKKATUKARA SREE NARAYANA VIJAYA SAMAJAM, CHOORAKKATUKARA DESOM, PUZHAKKAL VILLAGE, THRISSUR TALUK, REP. BY ITS PRESIDENT.

2. CHOORAKKATUKARA SREE NARAYANA VIJAYA SAMAJAM, -DO- ITS SECRETARY.

3. RAMAKRISHNAN, AGED 56 YEARS, S/O MANAKALATH KITTA, -DO-

4. SAROJINI, AGED 50 YEARS, W/O NELLIPPARAMBIL GANGADHARAN, -DO-

5. KAUSALLYA, AGED 56 YEARS, W/O KATTYALATH GOVINDAN, -DO-

6. MAMMADH, AGED 51 YEARS, S/O PATHIYA PARAMBATH KADHARKUNHY, -DO-

7. LOHIDAKSHAN, AGED 63 YEARS, S/O ACHUTHAN, MANAKALATH HOUSE,

CHOORAKKATUKARA DESOM,
PUZHAKKAL VILLAGE, THRISSUR TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 17/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 806 OF 2007

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Dated this the 17th day of December, 2007

JUDGMENT

Fourth plaintiff in O.S.1194/1983 on the file of Additional Munsiff, Thrissur is the appellant. Respondents are defendants and the other plaintiffs. Suit was instituted seeking a decree for injunction contending that plaintiffs are owners in possession of some portion of the property comprised in survey No.190 of Puthur Village and Choorakkattukara desom and situated just to the east of Kunnamkulam-Thrissur main road. According to the plaintiffs the entrance to their properties is from the said road and for that purpose there was a way starting from that road having a width of 2 ½ kole east west and 2 kole north south. It was contended that it is is the only way leading to the property of plaintiffs which is being used by them and their predecessors for more than 35 years openly, continously and

uninterruptedly without any objection as of right and as an easement and they have prescribed a right of way by easement of prescription and are also entitled to a right of way by easement of necessity. The property of Sree Narayana Guru Samagam of which respondents 1 and 2 are the office bearers, is situated at the starting point of the way and the way is in between the temple property and the property of third respondent and respondents 1 and 2 raised a claim over the property of the temple. Apprehending that the way would be annexed by them, plaintiffs sought a decree for injunction restraining respondents 1 to 3 from annexing the way or causing obstruction to its usage. Respondents 1 and 2 in the written statement contended that plaintiffs and third defendant had properties comprised only in survey No.190/2 and from Kunnamkulam -Thrissur main road there is entrance to the proprety of plaintiffs without using the plaint schedule property and appellants have no right over the property claimed

and as per registered document the way was allotted to the plaintiffs and third respondent is in survey No.190/2 and there is no well defined way as referred to in the plaint and therefore plaintiffs are not entitled to the decree sought for. It was also contended that plaintiffs and defendants and members of the locality decided to measure the extent of Cheerakuzhi temple property and the property was measured and while so it was found that some portion of the temple property on the southern and eastern side were in the possession of plaintiffs and third respondent. They agreed to surrender possession of the respective properties in favour of the temple. Thereafter suppressing the true facts suit was filed. It was contended that plaintiffs have no right of way either by easement by prescription or easement by necessity and therefore suit is to be dismissed.

2. Learned Munsiff originally dismissed the suit. Plaintiffs challenged the judgment before

District Court, Thrissur in A.S.241/1989. But confirming the decree of the trial court first appeal was dismissed. It was challenged before this court in S.A.701/1993. This court set aside judgments of the courts below and remanded the suit for fresh disposal. Learned Munsiff subsequent to the remand, as directed by this court appointed the same Commissioner who originally submitted C1 to C3. He submitted Ext.C4 report and Ext.C4(a) plan. Learned Munsiff on the evidence found that the way available to the plaintiffs and third respondent is not through the temple property and the plaint schedule property does not form part of the property covered under Ext.B2 held that they are not entitled to the decree sought for. The suit was dismissed. Plaintiffs 1 and 5 alone challenged the judgment before District Court, Thrissur in A.S.86/2006.Learned Additional District Judge on reappreciaiton of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal by only the fourth

plaintiff.

3. Learned counsel appearing for appellant heard.

4. The argument of learned counsel is that the suit being only one for injunction courts below should not have decided the question of title to the property and on the evidence should have found that appellant and his predecessors have been using the plaint schedule way openly, peaceably and uninterruptedly and as of right and thereby prescribed a right of way by easement of prescription and therefore entitled to the decree sought for. Learned counsel also argued that subsequent to the disposal of the appeal, the temple instituted O.S.661/2006 before Munsiff Court, Thrissur seeking recovery of possession of the pathway being used by appellant on the strength of title and findings in the impugned judgments on the question of title will prejudice the appellants in agitating the claim as plea of res judicata may be raised and therefore findings on

the question of title and trespass are to be set aside.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. The present suit is only one for injunction contending that plaintiffs have a right of way over plaint schedule property both as by easement of necessity and easement of prescription. The question of title as such was not decided in the suit. No issue on title was framed or decided. Courts below on the evidence found that as held by this court in S.A.701/1993, the quintessence of the dispute is whether pathway claimed by plaintiffs is the pathway referred to in Ext.B2. Plaintiffs were agitating the claim based on Ext.B2. Hence that was the only question to be decided in suit. Courts below, in the light of the evidence especially Ext.B2, Ext.C4 report and C4(a) plan found that the pathway claimed by plaintiffs in the suit is not the pathway provided under Ext.B2.

The entire case of the plaintiffs was built on the edifice that the pathway which is being used by plaintiffs over which the relief was claimed is the pathway provided under Ext.B2. The question whether the pathway so claimed by plaintiffs is the pathway provided under Ext.B2 is a question of fact. The trial court and first appellate court on appreciation of evidence rendered a finding that the pathway provided under Ext.B2 is not the pathway noted by the Commissioner and being used by the plaintiffs. That factual finding cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure. Therefore appellant is not entitled to the decree. Appeal is dismissed in limine. It is made clear that dismissal of the appeal will not be a bar to the appellant from raising his claim with regard to the existing way in the pending suit except the identity of the way.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006